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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1001

AUTHER LARNCE KING and JAMES ALBERT KING,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

Of Order Denying Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

GEORGE C. HARRISON
3755 Highway 51 South
Memphis, Tennessee 38116
WARNER HODGES
604 Memphis Bank Building
Memphis, Tennessee 38103
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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Petitioners Auther Larnce King and James Albert King, present their Petition for a rehearing of the Court's Order dated February 24, 1970, denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and, in support thereof, respectfully shows:

1. That since filing their Petition for Writ of Certiorari in this Court on December 26, 1969, the Third and Ninth

Circuit Courts have rendered decisions on the Allen Charge which are substantial intervening circumstances to warrant this Court granting Petitioners Petition for Writ of Certiorari.

2. Decisions from the Fifth Circuit which were not listed in Petitioners' original Petition for Certiorari but which question the Constitutional validity of the Allen Charge are cited for the purpose of bringing to the Court's attention the necessity of formulating a definite test by which to determine impartiality.

In **United States v. Fioravanti** (1969), 412 F. 2d 407 (3rd Circuit).

Third Circuit states that in future jury trials, use of the Allen Charge will be deemed error and normally reversible error.

Although the Court refused to reverse the defendant's conviction in this case because of the ample evidence of his guilt, the Court did warn that it would not let any future verdict stand which may have been influenced in any way by an Allen Charge.

In **Sullivan v. United States** (1969), 414 F. 2d 714 (9th Circuit).

Ninth Circuit doubts that it is really any longer advisable to give the Allen instruction at all, and it certainly should be given only when it is apparent to the District Judge from the Jury's conduct or the length of its deliberations that it is clearly warranted.

The Fifth Circuit in a Number of Recent Decisions Has Questioned the Constitutional Validity of Such a Charge as the Allen Charge

In **Thaggard v. United States**, 354 F. 2d 735, 739 (5th Circuit 1965), cert. denied 383 U. S. 958 (1966).

Judge Coleman, in a critical concurring opinion, attacked the Allen Charge as violating the right of the accused to a trial by an impartial Jury.

In **Huffman v. United States**, 297 F. 2d 754, 755 (5th Circuit 1962), cert. denied, 370 U. S. 955 (1962).

Judge Brown in a dissenting opinion, condemned an Allen type instruction as violating the Constitutional ideal of a fair and independent Jury.

CONCLUSION

The Sixth Amendment guarantees the accused the right to a public trial by an impartial Jury in all criminal prosecutions. However, the Allen Charge asks a dissenting Juror to consider his position because the majority takes an opposite view. The Allen Charge not only urges that a Juror reconsider his stand in view of the majority's position, but directs the dissenters to recognize that a majority is adverse to him, and he should allow this to influence his decision. A view of this type is contrary to the theory that a defendant is to be convicted only if each Juror believes that he has been proven guilty beyond a reasonable doubt. The Allen Charge has the effect of lowering the standard of proof required for establishing reasonable doubt to what the majority considers sufficient rather than what all twelve Jurors thought would be sufficient.

One of the characteristics of the Jury system is the possibility of a hung Jury and the Allen Charge is an evil which the Supreme Court should correct.

This Court since given its approval to the instructions in Allen v. United States in 1896 has had numerous opportunities to reconsider its position but has refused to do so by either refusing to hear the cases or has gotten around it by deciding the cases on other grounds.

Justice Clark once stated that there is no place in our system for such an instruction and that "Allen is dead law", so let us bury it.

Petitioners pray that the Court will take this opportunity to formulate a definite test by which to determine impartiality and determine whether the Allen Charge violates the Constitutional standard of impartiality.

For the foregoing reasons it is respectfully urged that this Petition for a rehearing be granted, and that, upon further consideration, a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Dated March 11th, 1970.

Respectfully submitted

GEORGE C. HARRISON
3755 Highway 51 South
Memphis, Tennessee 38116

WARNER HODGES
604 Memphis Bank Building
Memphis, Tennessee 38103
Attorneys for Petitioners

Certificate of Counsel

I, Warner Hodges, one of the attorneys for the above named petitioners do hereby certify that the foregoing Petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

Dated: March 11th, 1970.

.....
Warner Hodges

Certificate of Service

I, George C. Harrison, one of the attorneys for Petitioners, Auther Larnce King and James Albert King, hereby certify that a copy of the foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari was mailed postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530, attorney for Respondents, on this the 11th day of March, 1970.

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George C. Harrison